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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service	)	GN Docket No. 96-228

REPLY

The Wireless Cable Association International, Inc. ("WCA"),[1] by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, hereby replies to the Opposition to Further Petition for Partial Reconsideration ("Opposition") filed by Metricom, Inc. ("Metricom").

I. INTRODUCTION.

On April 14, 1997, WCA timely submitted in accordance with 1.429(a) of the Commission's Rules, a Further Petition for Partial Reconsideration ("Petition") of the Commission's April 2, 1997 *Memorandum Opinion and Order* (the *"WCS Reconsideration Order"*).[2] As made clear in the Petition, WCA's sole concern relates to the Commission's decision to "sunset" on February 20, 2002 -- just five years after the initial decision to establish WCS -- the protection afforded MDS/ITFS

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[1] WCA is the principal trade association of the wireless cable industry. Its membership includes virtually every wireless cable operator in the United States, the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators, producers of video programming and manufacturers of wireless cable transmission and reception equipment. MDS and ITFS licensees operate in the 2.1 and 2.5-2.7 GHz frequency bands. Accordingly, WCA's membership has a vital interest in the Commission's rules for the Wireless Communications Service ("WCS") insofar as they relate to interference protection from WCS licensees operating in the 2.3 GHz band.

[2] *See Memorandum Opinion and Order, Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 11 FCC Rcd 97,112 (rel. April 2, 1997).

downconverters that are installed on or before August 20, 1998.[3/] WCA does not object to the Commission's determination that all downconverters installed after August 20, 1998 should be capable of withstanding interference from WCS systems. Nor does WCA suggest that WCS licensees should be required to protect existing MDS/ITFS downconverters for an unlimited period of time. Rather, the Petition reflects WCA's belief that the five-year "sunset" adopted by the Commission will impose unnecessary economic hardship on wireless cable and distance learning systems, since the Commission in effect is requiring that a large number of MDS/ITFS downconverters be changed out long before the end of their 10 year plus useful life, regardless of whether the replacement of downconverters in a given market is even necessary to accommodate WCS operations.[4/] Accordingly, WCA's Petition requests that the Commission further modify its WCS rules to require WCS licensees to assume responsibility for remedying interference to MDS and ITFS licensees where the complaint of interference is received by the earlier of five years after the date the WCS licensee has commenced operations within its service area or February 20, 2007[5/].

Metricom does not even attempt to refute the facts underlying the Petition — that the current rule will effectively force wireless cable operators and educators involved in distance learning unnecessarily to replace downconverters before the end of their useful lives. Rather, Metricom contends that although WCA's Petition was timely filed and pending at the time the WCS auction commenced, adoption of WCA's proposal would constitute an impermissible retroactive application of a new rule because Metricom assumed that the WCS rules existing at the time of the auction

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[3/] *WCS Reconsideration Order*, at ¶ 15.

[4/] *See* WCA Petition, at 3.

[5/] *See id.*, at 4.

would not be altered.[6] Taken to its logical conclusion, Metricom appears to be arguing that once the Commission commenced the WCS auction, the Commission was forever banned from imposing increased obligations upon WCS licensees. As will be demonstrated below, that position is absurd; whether it uses competitive bidding or some other method for issuing radio licenses, the Commission always retains the inherent authority to modify its rules and impose new obligations on licensees as required by the public interest.

II. DISCUSSION

Simply put, Metricom's Opposition is based upon a flawed presumption - - that once the Commission commences an auction of spectrum, auction participants can reasonably assume the rules applicable to that spectrum are static and the Commission is forever barred from changing the obligations imposed upon licensees of that spectrum. In this particular case, the "reasonableness" of Metricom's assumption is belied by the facts; WCA's Petition was timely filed in accordance with Commission rules affording WCA the right to seek reconsideration of the *WCS Reconsideration Order*,[7] and was pending when the WCS auction commenced. Under these circumstances, Metricom's claim that it reasonably believed the WCS rules were settled defies credulity.[8]

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[6] *See* Metricom Opposition, at 2-3. While Metricom complains mightily regarding the timing of WCA's filing, it ignores the fact that the pending Petition was submitted less than two weeks after release of the *WCS Reconsideration Order* and long before the deadline established under the Commission's rules.

[7] *See* 47 C.F.R. §1.429(a)

[8] *See, e.g. General Telephone Co. of the Southwest v. US*, 449 F.2d 846, 864 (1971)[hereinafter cited as "*General Telephone*"]("Our decision that the disputed rules is reasonable is facilitated by a finding that reliance by [the petitioners] on the Commission's putative acquiescence [in their conduct] should not have been great."); *Bell Atlantic Telephone Cos. v. FCC*, 73 F.3d 1195, 1207 (1996)("The rule does not upset petitioners' reasonable reliance interests. The state of the law has never been clear. . . .").

Moreover, even assuming for purposes of argument that the WCS interference protection rules had become final when the auction commenced, the Commission nonetheless retains the post-auction authority to impose additional obligations upon WCS licensees when the public interest so dictates. As the Commission recently stated with crystalline clarity, "the goal of [our] spectrum policy is not to preserve the value of the licenses that auction winners acquire, but to promote competition and service in the public interest."[9/] If adoption of the rule changes proposed by WCA would result in some minor reduction in the value of Metricom's WCS licenses (and it is not clear it will),[10/] so be it, for the Commission's objective of promoting competition will surely be advanced by avoiding the hardships identified in the Petition.

Metricom's legal position simply cannot be squared with the Communications Act of 1934, as amended (the "Act"), Section 301 of the Act establishes that the Commission's primary purpose is to "maintain control of the United States over all the channels of radio transmission" and to provide for the licensing of these channels without conferring ownership rights thereto.[11/] Section 304 provides that, regardless of whether a licensee secured its authorization through competitive

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[9/] *See Amendment of the Commissions Rules to Establish New Personal Communications Services, Narrowband PCS*, GN Docket No. 90-314, FCC 97-140 at ¶ 32 (rel. Apr. 23, 1997).

[10/] It is worth noting that Metricom's Opposition does not even allege, much less demonstrate, that Metricom would be adversely impacted by the rule changes proposed by WCA. Significantly, under the rules adopted in the *WCS Reconsideration Order*, the WCS licensees operating with a peak EIRP of less than 50 watts have no interference protection obligations whatsoever towards MDS/ITFS reception equipment. *See WCS Reconsideration Order*, at ¶ 15. Curiously, Metricom avoids any discussion of whether it intends to operate with an EIRP of 50 watts or more. Therefore, there is no evidence on the record that Metricom would suffer any increased burden by adoption of WCA's proposal.

[11/] 47 U.S.C. § 301. *See Revision of the Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9766 (1995) (citation omitted) [hereinafter "*DBS Report & Order*"], *appeal denied, DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

bidding or some other licensing mechanism, before it can receive a grant of a station license it must "waive[] any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."[12/] That Sections 301 and 304 do not distinguish between those who secure their authorizations at auction and those who are licensed using comparative hearings, random selection or other mechanisms is not surprising, for when Congress authorized the use of auctions for the issuance of licenses, it sought "to ensure that the legislation alters only the licensing process, and has little or no effect on the requirements, obligations or privileges of the license holders."[13/]

It is well settled under Sections 301 and 304 of the Act that the Commission "enjoys wide latitude when using rulemaking" to change existing policies, even if those changes have an adverse impact upon licensees.[14/] "[T]he Commission may modify any station license or construction permit if such action will promote the public interest, convenience, and necessity, and... such modification may be appropriately be accomplished through notice and comment rulemaking ."[15/] Despite Metricom's so-called "reliance" upon existing WCS interference protection rules at the time of the auction, changes thereafter do not constitute an impermissible retroactive application of a new rule.[16/] Significantly, grant of the Petition would not result in any prior conduct being deemed violative of the Commission's Rules. It is well-settled that:

[12/] 47 U.S.C. § 304. *See DBS Report & Order*, 11 FCC Rcd at 9766.

[13/] H.R. Rep. No. 103-111, at 259 (1993) (emphasis added).

[14/] *DBS Report & Order*, 11 FCC Rcd at 9767.

[15/] *See id.*

[16/] Metricom Opposition, at ¶ 4.

> [t]hat rules of general applicability, though prospective in form, may ascribe consequences to events which occurred prior to their issuance does not, on that basis alone, invalidate them.
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> * * *
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> Admittedly the rule here at issue has an effect on activities embarked upon prior to the issuance of the Commission's Final Order and Report. Nonetheless, the announcement of a new policy will inevitably have retroactive consequences. The property of regulated is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently that new rules may abolish or modify pre-existing interests.[17/]

Although cited by Metricom,[18/] the decision of the United States Court of Appeals for the District of Columbia Circuit in *DIRECTV v. FCC*[19/] is illustrative of how far the Commission can go in altering rules and policies despite their adverse impact on licensees' expectations. In the case, the petitioners argued that because they had spent millions of dollars building satellites in reliance upon then-existing Commission policies under which they would receive additional Direct Broadcast Satellite ("DBS") channels in the event of license forfeitures by other licensees, the Commission was barred from thereafter changing those rules and utilizing competitive bidding to award recaptured channels.[20/] In rejecting that argument, the Court clearly stated:

> A rule that upsets expectations may be sustained if it is reasonable, i.e., if it is not arbitrary or capricious. A change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The Commission is entitled to reconsider and revise its views as to the public interest and the means needed to protect that

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[17/] *General Telephone*, 449 F.2d at 863-64 (citations omitted) *See also Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, 1499 (1994) (" a statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment... or upsets expectations based in prior law." (citations omitted)).

[18/] *See* Metricom Opposition, at ¶ 4.

[19/] 110 F.3d 816 (D.C. Cir. 1997).

[20/] *See DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

interest.[21/]

As the Commission has recognized:

> It is often the case that a business will undertake a certain course of conduct based on the current law, and will find its expectations frustrated when the law changes. This has never been thought to be retroactive lawmaking, and indeed most regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.[22/]

Finally, even if one were to assume for purposes of argument that a grant of the Petition would constitute retroactive rulemaking, there is no doubt that the Commission may nonetheless grant the Petition. The Commission has clearly stated, "[T]here can be no question that a license is issued subject to the Commission's rules as well as any future revisions thereto."[23/] While Metricom properly recognizes that the five factors identified in *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, are determinative of whether a new rule should be retroactively applied, Metricom fails to properly apply those factors to the present circumstances.

This is best illustrated by Metricom's approach to the first three factors -- whether the particular case is one of first impression, whether the new rule represents an abrupt departure from well-established practice, and whether parties reasonably relied on the existing rule. Metricom disingenuously would have the Commission believe that the Commission has previously addressed

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[21/] *Id.* at 821. *See also General Telephone Co. of Southwest v. U.S.*, 449 F.2d 846, 863 (5th Cir. 1971) ["Where a rule has retroactive effects, it may be sustained in spite of such retroactivity, if it is reasonable...In a complex and dynamic industry such as the communications industry, it cannot be expected that the agency charged with its regulation will have perfect clairvoyance"].

[22/] *DBS Report and Order*, 11 FCC Rcd at 9768-69, *citing Chemical Waste Management, Inc. v. Environmental Protection Agency*, 869 F.2d 1526, 1536 (D.C. Cir. 1989).

[23/] *Report and Order,Changing the Cochannel Mileage Separation and Frequency Loading Standards for Conventional Land Mobile Radio Systems*, GN Docket No. 79-106, FCC 79-583 at ¶ 16 (rel. Oct. 11, 1979).

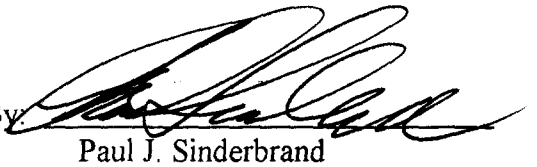
the issues in WCA's Petition, that adoption of WCA's proposal would represent an abrupt departure, and that Metricom had a reasonable basis for assuming the rules would not change.[24/] In so doing, Metricom conveniently ignores the fact that the rules and policies adopted in the *WCS Reconsideration Order* had never become "final," as WCA filed the Petition in accordance with Section 1.429(a) of the Commission's Rules before the WCS auction started, and long before the deadline for filing of the Petition. Since the Commission's Rules clearly provide WCA an opportunity to petition for reconsideration of the *WCS Reconsideration Order*, and since WCA properly did so, it is patent that the Commission's policies regarding WCS interference obligations had never been settled and Metricom had no basis for relying on them. Thus, the first three factors under the five-prong test must be resolved in WCA's favor.

It bears repeating that Metricom has not challenged WCA's showing that the existing rule will impose substantial hardship on wireless cable and distance learning systems by requiring the replacement of downconverters before the end of their useful lives, despite the fact that such replacement may not be necessary. While Metricom complains of the financial burden that may be imposed on some WCS licensees under WCA's plan, it provides no information to support its claim that adoption of WCA's approach would impose an "unreasonable burden." Nor does Metricom address the public interest benefits associated with relieving wireless cable and distance learning systems of undue financial burdens. When those elements are considered, it becomes clear that Metricom has also failed to show that either of the final two factors of the five-prong test require rejection of the Petition.

[24/] *See* Metricom Opposition, at 5-6.

WHEREFORE, WCA reiterates its request that the Commission further modify the rules adopted in the *WCS Reconsideration Order* as requested in the Petition.

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

By: 
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June 16, 1997

CERTIFICATE OF SERVICE

I, Joy M. Griffiths, hereby certify that on this 16 day of June, 1997, I caused copies of the foregoing Petition for Further Reconsideration to be served, by first class postage prepaid U.S. Mail, on the following:

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